U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Doering Meyer, et. al.
Class Agent,

v.

John Kerry,
Secretary,
Department of State,
Agency.

Appeal No. 0720110007

Hearing No. 570-2008-00018X

Agency No. DOSF03407

DECISION

Following its November 12, 2010, final order, the Agency filed a timely appeal which the Commission accepts pursuant to 29 C.F.R. § 1614.405(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) decision to certify a class complaint pursuant to 29 C.F.R. § 1614.204(d). The class complaint was brought pursuant to Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq*. For the following reasons, the Commission REVERSES the Agency's final order. The matter is REMANDED in accordance with ORDER below.

ISSUES PRESENTED

The issue presented is whether the AJ properly certified a class action on behalf of "all applicants for career Foreign Service employment with a disability who have been or will be denied employment from October 7, 2006 until the present because the State Department's Office of Medical Services denied them 'Class 1 - Unlimited Clearance for Worldwide Assignment' type clearance."

BACKGROUND

Facts

At the time of events giving rise to this complaint, the Class Agent (aged 46 at the time) was an applicant for the Foreign Service. Foreign Service personnel are utilized by the Department of State, Department of Commerce, Department of Agriculture, U.S. Agency for International Development (USAID) and the Broadcasting Board of Governors. Foreign Service applicants

are required to undergo testing, suitability determinations, security and a medical clearance. The Department of State's (Agency) Office of Medical Services is responsible for medical examinations and clearance determinations for personnel who seek employment within the Foreign Service.

The Agency requires its candidates to have "Worldwide Availability," which it defines as being medically qualified to go to one of more than 200 posts around the world, including those with limited medical facilities. See Report of Investigation at Exhibit 12. One who is found to be "Worldwide Available" receives a "Class 1 - Unlimited Clearance for Worldwide Assignment." Class 1 Clearances are issued to "examinees with no identifiable medical condition that would limit assignment abroad." 16 Foreign Affairs Manual (FAM) 224.[1] At the time of the events in question, if the candidate did not receive a Class 1 Clearance, they were issued a Class 5 (Disqualification for Medical Reasons) Classification. 16 FAM 221(b).

If denied a Class 1 Clearance, the candidate could then request a waiver from the hiring agency directly. Id. Each federal agency which utilizes the personnel of the Foreign Service has its own waiver program. If the candidate is granted a waiver, or found to be Worldwide Available, their name is placed on the hiring register. A candidate who has been on the hiring register for 18 months without being hired is removed from the register, and not eligible to be rehired. One cannot get on the hiring register until they have either received a Class 1 Clearance indicating they are Worldwide Available, or until they have sought and received a waiver of that requirement. [2]

The Class Agent applied for the Foreign Service, passed her written and oral exams, and in October 2005, was granted a Conditional Offer of Appointment, which was contingent on her satisfactory completion of the medical, security, and suitability clearance processes. On September 20, 2005, she submitted a medical history questionnaire, wherein she disclosed she had been diagnosed with Multiple Sclerosis in 1994. On November 29, 2005, the Office of Medical Services requested medical documentation of the evaluation that led up to the diagnosis of Multiple Sclerosis. Complainant submitted documentation on January 20, 2006. Then, Complainant was asked to have a neurological examination. Complainant did, and

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[1] The Foreign Affairs Manual contains the functional statements or organizational responsibilities and authorities assigned to each major component of the Department of State. See, 1 FAM 011.1.

[2] The State Department asserts on appeal that its procedures have since changed somewhat since the filing of this complaint. Specifically, it states that effective May 2007, after a denial of worldwide availability the Agency would now assign a Class 2 Clearance instead of a Class 5. The applicant would still require a waiver by the Human Resources Office in order to be placed onto the hiring register. In October 2009, the Foreign Affairs Manual was amended to include a referral to a three physician panel which conducts a medical appeal after a denial of worldwide availability, in addition to the subsequent administrative waiver process performed by Human Resources. Furthermore, it contends that May 2010, it changed the definition of "worldwide available".

submitted further documentation in September 2006. The Office of Medical Services then asked for medical documentation from a Board Certified Neurologist because the Class Agent's original submission did not come from a medical doctor. In response, on October 23, 2006, the Class Agent submitted information from a Board Certified Neurologist who reported:

> That [he does] not, at this point, see any reason why the patient could not work overseas. She has had a benign course of multiple sclerosis to date and does not have any significant disability.

On October 30, 2006, the agency notified the Class Agent that the Office of Medical Services determined that the Class Agent was not Worldwide Available because she either has an active illness or condition that requires medical follow up for treatment not available overseas; or because of an inactive condition that requires testing not available worldwide. Specifically, the Office of Medical Services determined that Multiple Sclerosis was unpredictable, and the Class Agent could suffer from "fatigue, weakness, tremor, pain, and visual disturbances," which could be exacerbated by "stress, generalized infections, heat, humidity, and emotional upset. The limiting factor in the opinion of medical services, residence in a tropical environment." Taylor Deposition at p.69.

Instead, on October 31, 2006, the Class Agent was issued a "Class 5 – Not Cleared for Medical Assignment Abroad Classification." ROI at Exhibit 12. The Class Agent was simultaneously advised of her right to request a waiver of the worldwide availability requirement from Human Resources, if it was in the best interest of the Service. According to the letter, "waivers are rarely granted, and then only in situations where there is a genuine service need for skills a candidate may possess." ROI at Exhibit 12. If the Class Agent did not request a waiver, her "candidacy will be terminated." ROI at Exhibit 2.

On November 21, 2006, the Class Agent authorized the release of medical documentation and applied for a waiver. In her Request, the Class Agent stated that she did not believe that she required any accommodations, but in the event the Agency refused to consider a waiver without an accommodation, she requested a Class 2 Clearance. ROI at Exhibit 3.

The criteria used at the State Department to evaluate whether a waiver would be granted were: (1) what percentage of posts is the candidate currently available to be assigned; (2) is the disqualifying condition considered permanent or temporary in nature?; (3) what is the nature of the specific position for which the candidate is applying ? (e.g., will this person be a specialist with skills the Foreign Service is in great need of at this time); and (4) Does this candidate otherwise possess some extraordinary skill or experience, the value of which would outweigh his or her inability, to be assigned worldwide? 16 FAM 222.

On February 14, 2007, the Agency approved Complainant's waiver request. The Class Agent was placed on the hiring register, and was selected for a position on July 15, 2008.

Procedural History

The record reveals that the Class Agent contacted an EEO Counselor on November 21, 2006, and filed an individual formal complaint on January 8, 2007.[3] While discovery was ongoing, she filed a Motion for Class Certification on August 21, 2008, to convert her individual complaint to a class complaint. On December 5, 2008, the agency filed its opposition to the Class Agent's Motion, and the Class Agent replied on December 22, 2008.

AJ Decision

The Class agent alleges that the State Department's Worldwide Availability policy as administered, disparately treats and disparately impacts qualified individuals with disabilities. The Class Agent further contends that the policy denies the class the individualized assessment required, which results in the agency basing hiring decisions on stereotypical notions of medical conditions. She asserts that the worldwide availability requirement requires every candidate to be able to work wherever the Foreign Service has a post, without reasonable accommodation. The Class Agent also claims that the policy disparately impacts those over the age of 40.

In her decision, the AJ noted she was presented with evidence obtained during discovery that established from October 7, 2006 until October 8, 2008, the Office of Medical Services denied 49 Foreign Service candidates Class 1 Clearance for Worldwide Availability. The vast majority of these individuals applied for State Department positions. Of the State Department candidates, 21 sought waivers, and 25 did not. Only four, including the class agent, received a waiver. Of the 25 who did not seek waivers, two were hired for unknown reasons. All three non-State Department candidates were denied waivers and were not hired. The candidates who were denied worldwide availability had a variety of conditions, including anxiety, diabetes, HIV, sickle cell disease, and arthritis.

The AJ found that the State Department's policy requiring worldwide availability affects all members of the purported class because individuals who cannot work in all locations are denied positions without any reasonable accommodation considered or individualized assessment conducted. The AJ found the centralized policy involves common questions of fact in that all applicants received conditional offers, but were denied a position because of their actual, perceived or record of disability.

The AJ found that the waiver request process did not allege a common set of facts because each Foreign Service agency had its own voluntary waiver process, and thus results would not be typical amongst the remaining class members. The AJ found four applicants who sought and received a waiver, and were ultimately hired by the agency. However, the AJ determined that the "worldwide availability" requirement, the first in a multi-step process, was the sole

[3] She later amended her complaint to add the basis of age.

policy at issue being challenged. The AJ also found that the differing disabilities among class members did not defeat commonality or typicality.

Moreover, the AJ found the Class Agent's claim was typical to those of the class because she was denied worldwide availability without any individualized assessment or accommodation consideration. The AJ was not convinced that the Class Agent's use of the waiver process and hiring defeated typicality because she was initially denied employment when she was denied Class 1 Worldwide Availability Clearance. The AJ reiterated that the only challenged policy raised by the class was the worldwide availability requirement, which satisfied the prerequisites for certification; regardless as to whether the class members ultimately took advantage of the agency's subsequent waiver process. The AJ noted that providing full relief to the Class Agent prior to the disposition of the class did not nullify typicality, unless her interest became antagonistic to those of the class. Rather, since the Class Agent was denied employment, she would be entitled to damages for the period of time she was denied employment, as well as compensatory damages and attorney fees.

The AJ found that the class satisfied the numerosity requirement because at a minimum, there were approximately 50 individuals denied worldwide availability from October 7, 2006 to October 8, 2008. The Class Agent states that number is expected to increase each year. Finally, the AJ found that the Class Agent's attorney was joined by counsel in Washington D.C. and therefore satisfied the adequacy of representation requirement.

As for the class claim of age discrimination, the AJ found no commonality because there was no nexus between the Worldwide Availability policy and the age of individuals denied worldwide availability. In that regard, the AJ found no anecdotal or statistical evidence which would support a finding that the policy disparately impacted applicants because of their age. The AJ also found the class did not meet the numerosity requirement on the basis of age.

Accordingly the AJ certified the following class:

> All applicants for career Foreign Service employment with a disability who have been or will be denied employment from October 7, 2006 until the present because of the State Department's Office of Medical Services denied them "Class 1 – Unlimited Clearance for Worldwide Assignment" type clearance."

On November 10, 2010, the Agency issued a final order rejecting the AJ's finding that the class should be certified.

CONTENTIONS ON APPEAL

Agency's Contentions

On appeal, the agency states that the Foreign Service Act mandates that Foreign Service personnel must be able to serve around the world, and that many of its 267 posts lack U.S.

quality medical facilities. It contends that since this complaint was filed, the Office of Medical Services has changed many of its procedures for assessing "worldwide availability." Accordingly, it suggests that many of those individuals who were found not worldwide available in 2006 may be currently worldwide available under new definitions and procedures.

The agency also argues that the proposed class definition is too broad if it was intended to include the entire Foreign Service, as only the Department of State is a respondent in the matter. Accordingly, the Commission could not order relief for applicants of other agencies, since they are not a party to this action. At a minimum, the Agency contends the USAID would be joined, since four (4) USAID applicants were denied Worldwide Availability by the State Department's Office of Medical Services, and then subsequently denied waivers by the USAID.

The agency claims that the class does not meet the prerequisites for certification. Specifically, the class does not meet the typicality requirement because the Class Agent was not denied employment, and therefore cannot be a member of the class. The agency contends that her hiring makes her claim not typical of the class, and her claim should be limited to only a delay in being hired. The agency also states that the AJ failed to establish that the Class Agent is an individual with a disability.

The agency argues commonality is lacking because some members of the class were granted waivers, and were eventually hired. Some utilized the services of the three physician panel in October 2009, and some did not. The agency reiterates that it changed its worldwide availability definition in 2010, so some members operated under varying definitions. Finally, it suggests that the varying disabilities and individualized assessments would defeat commonality.

The agency argues that the class lacks numerosity. It suggests that only the Class Agent and the three other State Department applicants who were granted waivers and hired should be included in the class. Finally, the agency maintains that the class representatives will not adequately represent the class.

Class Agent's Response

The Class Agent argues that the prerequisites for certification have been met. She argues that the Agency's Office of Medical Services centrally administers a discriminatory policy that disparately treats individuals with disabilities, and also operates a policy that results in a disparate impact against those with disabilities. She claims that the policy fails to provide any individualized assessments of disabilities and medical conditions, fails to incorporate any consideration of reasonable accommodation and operates on stereotypes.

She maintains that typicality is not defeated by her subsequent hire, or because of the varying disabilities in the class. She maintains that any subsequent changes to the Worldwide

Availability clearance process do not impact those that were denied employment prior to the changes. She further contends that the Class has satisified all requirements for certification.[4]

Amicus Submission

We also note that the Commission has received an "Amicus Letter" from the Consortium for Citizens with Disabilities (Consortium) in support of the Opposition to the Agency's Appeal of Class Certification. The Consortium explains that it is a coalition of more than 100 national disability-related organizations working to advocate for national policy that ensures full equality for individuals with disabilities. The Consortium and its related Task Forces argue that the Worldwide Availability policy negatively affects hundreds of job applicants. It urges the Commission to certify the class, as this case alleges a broad pattern of workplace discrimination, the exact type of case ripe for class certification.

ANALYSIS AND FINDINGS

Individual with a Disability

As an initial matter, we will address the agency's contention that the AJ failed to find the Class Agent was an individual with a disability. In the decision, the AJ found that, "the Class Agent has a disability, MS." (AJ Decision at p. 14). In her factual findings, the AJ found that the Class Agent had a record of a disability, but did not provide any further analysis. Prior Commission decisions have found that in order to bring a class complaint of disability discrimination, the Class Agent must demonstrate, at a minimum that she has a disability within the meaning of the Rehabilitation Act. Walker v. United States Postal Service, EEOC Appeal No. 0720060005, recon. denied, EEOC Request No. 0520080443 (May 16, 2008); Cyncar v. United States Postal Service, EEOC Appeal No. 0720030111 (February 1, 2007), recon. denied, EEOC Request No. 0520070348 (May 1, 2007). Accordingly, we find a broader analysis of whether the Class Agent is an individual with a disability is necessary.

One bringing a claim of disability discrimination must first establish that she is a member of the class of persons protected by the Rehabilitation Act, i.e., a qualified individual with a disability. An "individual with a disability" is defined as someone who: (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g)(1)-(3).

One with a record of a disability includes those persons who have a history of, or have been classified or misclassified as having, a physical or mental impairment that substantially limits one or more major life activities. See 29 C.F.R. § 1630.2(k). It includes persons who have

[4] In a separate statement filed on September 9, 2011, the Class Representative requests that we add a new Class Agent. This issue should be properly brought before the Administrative Judge on remand.

had a disabling impairment but have recovered in whole or in part and are not now substantially limited. EEOC Compliance Manual, Section 902- Definition of the Term "Disability" (March 14, 1995). It also includes persons who have been incorrectly classified as having a disability. Id.

The Class Agent asserts that when she was first diagnosed with Multiple Sclerosis, and during the period of 1994 to 1999, she was substantially limited in various life activities including giving birth (not being able to have children), walking, seeing, thinking, concentrating and work. The Class Agent's Multiple Sclerosis has been in remission since that time. Accordingly, after a review of the record, we find the record establishes that the Class Agent is covered by the Rehabilitation Act as an individual with a record of being substantially limited in the major life activity of walking. See 29 C.F.R. § 1630.2(k); and Edwards v. Department of Transportation, EEOC Petition No. 0320080101 (June 23, 2009)(two year period of knee impairments and breast cancer treatment constituted record of disability); Chavis v. United States Postal Service, EEOC Appeal No. 01983332 (August 16, 2001)(individual who had been treated in the past for lung cancer and required large amounts of sick leave found to have a record of a substantially limiting impairment on the major life activity of working).

In order to be entitled to protection from the Rehabilitation Act, the Class Agent must also make the showing that she was a "qualified individual with a disability." A "qualified individual with a disability" is an individual with a disability who satisfies the requisite skill, experience, education and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. § 1630.2(m). There is no dispute that the Class Agent is qualified for the position she sought, i.e., that she met the skill, experience, education and other job requirements to perform the Junior Foreign Service officer position. Accordingly, we find the Class Agent is a qualified individual with a disability.

Class Definition

The agency asserts that the Class Agent is not a member of the class because she was not "denied employment." At the most, her claim should be limited to a "delay in hiring." For this reason, we agree that the class definition should be clarified to:

> All qualified applicants to the Foreign Service who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not "world-wide available" due to their disability.

Moreover, the agency asserts that the class definition is not clear because it purports to involve applicants to the other Foreign Service agencies, such as USAID. It contends that the Commission could not bind other agencies or offer relief to applicants of other agencies because those agencies are not respondents in this matter. In the past, we have joined other

agencies to matters where they are "indispensable parties." See, Koch v. Office of Personnel Management, EEOC Appeal No. 01A13849 (December 21, 2001)(citing longstanding Commission policy as basis for directing, sua sponte, joinder of the Securities Exchange Commission as a party in complaint against OPM). Indeed, for example, "it has long been the policy of this Commission that when OPM and another agency bear joint responsibility for an act of alleged discrimination, both agencies are proper respondents and the complaint must be jointly processed." Reyes v. Office of Personnel Management, EEOC Request No. 0500916 (Nov. 15, 1990), citing Cloud v. United States Postal Service, EEOC Request No. 05881077 (June 9, 1989).

Based on the record currently before us, however, we cannot find that the USAID is currently an indispensible party because the only policy at issue here is the Worldwide Availability policy, which is solely administrated by the Agency. Although potential relief to the various class members could be affected by the joinder of other agencies, we do not find certification the proper time to address the question of potential relief. To the extent that the Class Representative suggests that USAID is an indispensible party when he attempted to add a new Class Agent in his submission of September 9, 2001, see infra at footnote 4, we reiterate that the issue of whether to join the other Foreign Service agencies, in particular, the USAID, should be raised before the AJ.

Class Certification

A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent of the class are typical of the claims of the class; and (iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2). The burden is on the party seeking to certify a class to meet all four requirements. Mastren v. United States Postal Service, EEOC Request No. 05930253 (October 27, 1993). Failure of a party to meet any one of the four requirements is sufficient reason for dismissal. See 29 C.F.R. § 1614.204(d)(2).

Commonality and Typicality

In addressing whether a class complaint warrants certification, it is important to first resolve the requirements of commonality and typicality in order to "determine the appropriate parameters and the size of the membership of the resulting class." Fusilier v. Dep't of the Treasury, EEOC Appeal No. 01A14312 (February 22, 2002) (citing Moten v. Federal Energy Regulatory Commission, EEOC Request No. 05960233 (April 8, 1997)).

Commonality requires that the Class Agent identify questions of fact common to the class. Mastren, EEOC Request No. 05930253. Factors to consider in determining whether members

treatment will involve common questions of fact include whether the practice at issue affects the whole class or only a few employees, the degree of local autonomy or centralized administration involved, and the uniformity of the membership of the class. See id. Further, evidence used by courts to determine whether individual and class claims meet commonality includes statistical and anecdotal testimony by other employees showing that there is a class of persons who were discriminated against, and evidence of specific adverse actions alleged. See Hines, et al. v. Dep't of the Air Force, EEOC Request No. 05940917 (January 29, 1996). As a practical matter, "commonality and typicality tend to merge." Hudson v. Dep't of Veterans Affairs, EEOC Appeal No. 01A12170 (March 27, 2003). Typicality exists where the Class Agent demonstrates some "nexus" with the claims of the class, such as similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. Thompson v. U.S. Postal Service, EEOC Appeal No. 01A03195 (March 22, 2001).

We find that the Class Agent has met the requirements of commonality and typicality. The Class Agent alleged that the agency has a practice of denying Class 1 Worldwide Availability Clearance to qualified individuals with disabilities following the Office of Medical Services determination that they are unable to serve in every Foreign Service post around the world because of their medical condition. In turn, this policy allegedly denies the benefits of employment within the Foreign Service to those with disabilities, without regard to accommodation, and without any individualized assessment into the individual's specific condition. We note that the Worldwide Available determination and policy is centrally administered by the State Department's Office of Medical Services in Washington D.C.

We find sufficient information in the record to support the inference that there was a uniform class of qualified individuals with disabilities harmed by the Worldwide Availability policy, and that this class shares common questions of fact. For example, were qualified individuals with disabilities denied Class 1 Clearances because of their disability? If the agency believed their disability would represent a direct threat, were individualized assessments performed during the WA process? If there was another reason for the denial, is there evidence of pretext? Were any reasonable accommodations requested, and if so, has the agency shown that it was an undue hardship to grant the requested accommodation?

Moreover, we find there is sufficient evidence in the record to support the inference that the policy has a disparate impact against individuals with a disability. Specifically, did the WA policy result in a disproportionate number of denials of Worldwide Availability to those applicants with disabilities?

The agency maintains that the waiver process offered by each Foreign Service agency defeats commonality. For instance, it states on appeal that among the 40 State Department applicants identified during discovery who were denied worldwide availability, 17 requested a waiver at that point, and 23 did not. (Only three were granted a waiver). Accordingly, it contends there will be varying questions of facts between those who requested waivers, and those who did not. Moreover, it suggests that with the 2009 addition of the three-physician panel to the procedure,

some members of the class would have other distinct questions of fact regarding their physician panel assessment.

We disagree with the Agency's argument, and find that our definition encompasses those applicants who were denied employment because they were denied Worldwide Availability, whether or not they took advantage of the elusive waiver process. While a waiver may be available if Worldwide Availability is denied, the record reveals many do not take advantage of it, and in fact, are *advised* that waivers are only rarely granted and only then when in the "best interest of the service." The determination of whether a candidate is Worldwide Available is the alleged discriminatory policy at issue in this class, and therefore, the later, optional waiver process does not defeat commonality, since the class definition accounts for the delay in hiring should the candidate request a waiver, and have that request granted by its employing agency.

With regard to typicality, we find the Class Agent has shown sufficient nexus between her claim and the claims of other class members. Specifically, the Class Agent alleged that she was denied Class 1 Worldwide Availability Clearance because of her disability, which delayed her hiring. We find the Class Agent's claim to be typical of the claims of the class since other applicants with disabilities would have the same interest and would suffer the same injury under the Class Agent's theory. Anyone denied Worldwide Availability was either not hired, or delayed in their hiring.

We are not persuaded by the agency's position that the class should not be certified if all members have different disabilities. See Walker v. United States Post Office, EEOC Appeal No. 0720060005, recon. denied, Request No. 0520080443 (May 16, 2008)(finding class members do not all have to be substantially limited in the same major life activities). This line of reasoning would virtually preclude the certification of disability class actions. To the contrary, the Commission has previously stated that it has no policy finding the Rehabilitation Act as "ill-suited" for class treatment. Travis v. U.S. Postal Serv., EEOC Appeal No. 01992222 (October 10, 2002). We have held, however, that the putative class agent must establish an evidentiary basis from which one could reasonably infer the operation of an overrriding policy or practice of discrimination. See Cyncar v. U.S. Postal Serv., EEOC Appeal No. 0720030111 (February 1, 2007); see also Garcia v. Dep't of the Interior, EEOC Appeal No. 07A10107 (May 8, 2003).

Here, we are satisfied that the class, which is comprised of over fifty individuals who have self-identified as having significant medical conditions such as HIV, diabetes, sickle cell and various other mental health disorders, has satisfied its burden of meeting the commonality and typicality requirements. The class has presented sufficient documentation that supports a reasonable inference that the Agency operated pursuant to an overriding policy of discrimination in violation of the Rehabilitation Act. The Class Agent's claim, coupled by the supporting documentation gathered so far, suggests that the Agency requires all applicants be available for work in 100% of posts, without regard to accommodations or individualized assessments, and is therefore sufficient evidence to infer that the agency operates an overriding policy or practice of discrimination. See id.

The agency argues on appeal that the changes made to its Worldwide Availability policy in 2009 and 2010 would defeat commonality and typicality. Neither the three physician panel, nor the alleged change in the Agency's definition of Worldwide Availability, defeats commonality or typicality because the Administrative Judge remains free to modify the certification order or dismiss the class complaint in light of subsequent developments. See General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982). The AJ has the authority, in response to a party's motion or on his/her own motion, to redefine a class, subdivide it, or dismiss it if the AJ determines that there is no longer a basis for the complaint to proceed as a class complaint. Hines v. Department of the Air Force, EEOC Request No. 05940917 (January 29, 1996). For instance, the AJ could further subdivide the class to include those groups of individuals who were subject to the changes, and those who applied prior to those changes taking place.

Moreover, to the extent that the agency argues that changes to the Worldwide Availability policy have eradicated any discrimination, we note that the changes, if corrective at all, do not affect those harmed before the changes.[5]

Numerosity

EEOC regulation 29 C.F.R. § 1614.204(a)(2)(i) requires that a class be so numerous that joinder of the complaint is impractical. While there is no minimum number required to form a class, and an exact number need not be established prior to certification, courts have traditionally been reluctant to certify classes with less than thirty members. Mastren, EEOC Request No. 05930253. The Class Agent has identified approximately 50 individuals denied employment because they were denied a Class 1 Worldwide Availability Clearance between October 7, 2006 and October 8, 2008. We find this number could grow each year the agency continues its alleged practice of denying Class 1 Worldwide Availability Clearances due to medical conditions without regard to reasonable accommodation, or without conducting an individualized assessment of particular medical conditions. Accordingly, we find numerosity has been met.

The agency claims that subsequent changes to the Worldwide Availability requirement impact numerosity, since it contends that some may have been affected by revised procedures and some were not. It asserts the class should not include the period of time after the changes were made.

We do not find this will impact our finding here that numerosity has been met according to the evidence of those denied Class 1 Worldwide Availability Clearance from October 2006 until October 2008. To the extent that the AJ finds that further subclasses should be identified based

[5] The Commission is not finding that changes made to the Medical Clearance process subsequent to the filing of the instant complaint have remedied any alleged discriminatory policy.

on subsequent changes to the Worldwide Availability policy made by the Agency in May 2007, October 2009, and May 2010, we have said that the Administrative Judge could modify the certification order, redefine a class, subdivide it, or even dismiss it if the AJ determines that there is no longer a basis for the complaint to proceed as a class complaint. See Falcon, 457 U.S. at 160; Hines, EEOC Request No. 05940917.

Adequacy of Representation

The final requirement is that the Class Agent, or her representative, adequately represents the class. To satisfy this criterion, the agent or representative must demonstrate that she or he has sufficient legal training and experience to pursue the claim as a class action, and will fairly and adequately protect the interests of the class. Besler, et al. v. Dept. of the Army, EEOC Appeal No. 01A05565 (December 6, 2001); Woods v. Dept. of Housing and Urban Development, EEOC Appeal No. 01961033 (February 13, 1998). In this regard, it is necessary for the class agent, or the representative, to demonstrate sufficient ability to protect the interests of the class so that the claims of the class members do not fail for reasons other than their merits. Id.

Upon review of the record, we find that the Class Agent's Representative, now one of two attorneys in his law firm, working alongside an experienced Washington D.C. law firm as co-counsel, satisfies this requirement. We find that the two firms have sufficient legal training and experience in this type of litigation to protect the interests of the class. Accordingly, the Commission finds that the AJ properly found that the Class Agent's representation would adequately represent the class.

Therefore, we find that the Class Agent has satisfied the requirement for class certification, and we therefore certify the class as defined below.

Age Claim

We also find that the AJ's decision with respect to the denial of certification of the class based on age is correct, as the Class Agent failed to establish through anecdotal or statistical evidence that the policy discriminated against applicants because of their age.

CONCLUSION

Accordingly, we REVERSE the agency's final action and REMAND this matter for further processing in accordance with the ORDER below

ORDER

It is the decision of the Commission to certify the class comprised of "all qualified applicants to the Foreign Service beginning on October 7, 2006, who were denied employment, or whose

employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not "world-wide available" due to their disability."

The AJ shall address the Class Representative's request to add a new Class Agent if properly raised before the AJ.

The agency is ORDERED to process the remanded class complaint in accordance with 29 C.F.R. §1614.204(e) et seq. Within 15 calendar days of the date this decision becomes final, the agency shall notify all class members of the acceptance of the class complaint in accordance with § 1614.204(e). Within 30 calendar days of the date this decision becomes final, the agency shall provide the appropriate EEOC District Office with a copy of the notice sent to the class members, and shall request the appointment of an AJ, who shall undertake the continued processing of the complaint pursuant to § 1614.204(f) et seq. The agency shall provide a copy of the notice of certification and request for appointment of an EEOC Administrative Judge to the Compliance Officer, as referenced herein.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney

with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

June 6, 2014
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

Doering Meyer
[redacted]

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JUN 06 2014
Date

Sherise Callaway
Equal Opportunity Assistant